ing Rights Society Case already referred to supports the view we take in the matter. Assuming that the statement in *James* v. *Smith*, 1 Ex. at 836 " one may sue alone, unless the non-joinder of his co-executor be taken advantage of by a plea in abatement " means that today a defendant must take out a summons to add the co-executor, it is clear that in the present case the defendant's solicitor drew the attention of the plaintiff's solicitor to the omission of the second executor and the plaintiff took steps himself to add the second executor. He cannot now blame the defendant for the ineffective (if they were ineffective) proceedings taken by the plaintiff to add his co-executor.

But do not consider that there was any duty on the defendant to move to add a plaintiff. In the old days a plaintiff could not plead in abatement of his own claim but a plaintiff can now move to have another person added as plaintiff. The old point of pleading so stressed by Dr. Withers Payne has no application at the present day.

In our opinion the second executor was a necessary party, judgment could not have been obtained by the first executor suing alone, (the writ and statement of claim disclosed the fact that there was a second executor); by the time the second executor was added (if he was properly added) and the suit properly instituted the statutory period of twelve years had expired (Limitation Ordinance, section 21); if he was not properly added the suit has not been properly instituted, and the limitation period has expired. The judgment of Mundell, J. was correct and this appeal is therefore dismissed with costs.

Nothing in this judgment is to be taken as deciding whether the occupation by the defendant enures for his own benefit or for the benefit of the Crown under colour of whose lease to him of a portion of Crown land the defendant appears to have occupied this contiguous land of which Moona Sidambaram Pillay held the title up to the time of his death.

Appeal dismissed.

Solicitors for the Appellants—*Drew & Napier.*

Solicitors for the Respondent—*Aubrey Davies & Co.*

[APPELLATE CRIMINAL JURISDICTION]

McElwaine, C.J.

February 10, 1936.

LIM LIM ..... **Appellant**

vs.

THE KING ..... **Respondent**

[SINGAPORE MAGISTRATE'S APPEAL No. 78 of 1937.]

Criminal law—road collision—contributory negligence—defence of—whether available—Penal Code (Chapter 20) s. 388.

Contributory negligence is no defence in a criminal case, but it may be weighed and considered if it has a bearing on the question whether the negligence (if any) of the prisoner was so gross, culpable or reckless as to disclose *mens rea* on his part or whether it was in any substantial sense a cause of the collision.

Semble, if the killed or injured person contributed to his own death or injury by his negligence, it may be taken into consideration when imposing punishment, but not where the prisoner's guilt is shared by another not being the injured party.

MAGISTRATE'S APPEAL.

The facts and arguments appear sufficiently from the Judgment.

Spenser Wilkinson for the appellant.

E. N. Taylor, Deputy Public Prosecutor, for the respondent.

Cur. Ad. Vult.

McELWAINE, C.J.—The appellant was convicted before E. E. Colman Esq., Fifth Magistrate, Singapore, on the following charge:—

> That he, on or about the 13th day of September 1936 at about 11-30 a.m. at Singapore caused grievous hurt to one, Tan Keong Lim, by doing an act, to wit, driving a motor van No. S.974 in Grove Road so negligently as to endanger the personal safety of others and thereby committed an offence punishable under section 338 of the Penal Code;

and was sentenced to three months simple imprisonment. He now appeals against conviction and sentence. At the same trial he was convicted on a charge of driving the motor van without a licence, but no appeal has been preferred in respect of this conviction.

The charge arises out of a collision which occurred at the intersection of Grove Road and Tanjong Katong Road. The appellant was driving the van along Grove Road in the direction of Singapore when he collided with a private motor car in which the injured lady Tan Keong Lim was a passenger. The car was travelling on Tanjong Katong Road in the direction of Amber Road and had got most of the way across Grove Road when the van struck the car on its left side. The point of impact is agreed to have been at a spot to the left of the middle line of Grove Road and slightly to the left of the middle line of Tanjong Katong Road, from the points of view of the van and car respectively. The van ended up by crossing the kerb at the South West corners of the intersection and going on to the grass. It came to rest heading nearly parallel to Grove Road. At or immediately after the collision the van must have been in some way diverted a little to its left. The rear of the van was 43 feet from the point of impact. The car ended up in a drain 53 feet from the point of impact. This drain was at the same corner as the van but definitely up Tanjong Katong Road in the direction in which the car had been travelling. The car however ended in the drain heading in the opposite direction to that in which it had been travelling. The engine of the van was pushed back which indicates that the collision took place at right angles.

On striking the car the van probably got slightly deflected to its left—that is, in the direction in which the car was travelling. This would account for the final position of the van. Similarly the final position of the car would appear to have followed the resultant of its own forward motion and the blow on its left side. How the car turned round so as to be headed back towards Grove Road is not explained in the evidence and appears to be a matter of speculation, but the positions of car and van and the damage done to them suggest that both must have been going fairly fast.

Four persons who were present at the collision gave evidence. The first was the driver of the motor car. This man gave evidence that he was going at fifteen miles an hour before he reached the intersection because he was afraid of meeting traffic at the junction and that he slowed down to five miles an hour crossing Grove Road. He swore he had looked right and left before crossing the junction and did not see the van until after it had run into his rear. Possibly this last expression " ran into my rear " means no more than that the impact was behind the driver's seat. The impact was not on the driver's side of the car. Visibility at this junction is good. The corners are not blind: a person 80 to 88 feet from the junction on Tanjong Katong Road can see a car on Grove Road 80 to 88 feet before the car reaches the junction and *vice versa*. A young girl who was in the car said it was travelling at a normal speed. She saw the van coming quite fast about 20 yards off and called out. This witness was not of any great positive value but it is clear that she made no attempt to reconstruct the accident or to persuade herself from the fact of the collision that she must have seen what happened before that occurrence. The accused in evidence said that he saw the car approaching the junction very fast on his right. "I thought the other car would pass in front or behind. There was ample room." Asked why he did not stop and let the car go ahead. the accused replied " As I approached the junction I saw it coming, I thought I could cross the junction. I sounded my horn and proceeded." This witness said he approached the junction at about 25 miles per hour but before actually going across he slowed down to 20 miles per hour or less. He also said that the car ran into his side which it certainly did not. The man sitting at accused's side saw the car coming very fast and said " quickly, horn. car coming." This witness tried to put on the hand brake but was too late.

I think the Magistrate was fully justified in finding that both vehicles entered the junction without noticeable deceleration and that the speed was high. It seems to me that both vehicles were to blame. Generally speaking what is called contributory negligence is no defence in a criminal case. It was suggested by the learned Deputy that in any case the injured lady was not in any way negligent and that therefore there could not be contributory negligence. But in a criminal case I see no reason why so called contributory negligence should not include any negligence additional to that of the accused and contributory to the disaster.

Further, it appears to me that even in a criminal case contributory negligence should be weighed and considered—not as affording a defence or excuse—but because it may have a bearing upon the question whether the negligence (if any) of the accused was so gross, culpable or reckless as to disclose *mens rea* on his part, or whether it was in any substantial sense a cause of the accident. The collision might be caused by culpable negligence, both parties might have been negligent but the culpable negligence might all be on the side of the person whose negligence contributed to the collision, and who was not charged. It was contended for the appellant that the magistrate did not consider what was the main, direct, effective or proximate cause of the collision. These adjectives have often been used in civil cases. They have been criticized as being puzzling even to lawyers and to require definition by explanatory formulae also not easy to understand. They have been avoided by Lord Hailsham in *Swadling* v. *Cooper*, 46 T.L.R., 597; (1931) A.C. 1.

If a person does an act negligently and in doing that act causes hurt or death his act is the effective cause of the hurt or death though possibly the negligence may not be the cause, but a pure coincidence occurring at the time of the mishap.

Thus, a person standing in a cart and driving the horse quietly along a public road on his proper side without reins is probably doing a criminally negligent act, but if while so doing a person is run over the negligent act would not be an effective cause of the injury if the driver, had he the reins in his hand, could not have avoided running over the person. *The Queen* v. *Dalloway*, 2 Cox C.C., 273.

Similarly, intervening negligence of another may be the proximate cause of the accident as in the *Queen* v. *Ledger*, 2 F. & F., 857 where the accused started a train three or four minutes instead of five minutes after the preceding train. The collision which followed was due to another person having caused the preceding train to stop in a tunnel when the next train ran into it. The collision was due to the stopping of the preceding train, not to the too early start of the following train.

On the other hand, the negligent act of A may cause B to hurt or kill C. In this case the negligence of A would be an effective cause of the accident to C whether or not B (who alone was in collision with C) was negligent also and that none the less because A collided with no one.

In a criminal case the considerations are—was the accused a cause of the accident? if yes, was the accused negligent and did the negligence contribute? If those questions are answered affirmatively the fourth question arises—was his negligence so gross or rash that it "went beyond a mere matter of compensation between subjects and shewed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment." *R.* v. *Bateman* 18 Cr. App. R. 8; 41 T.L.R. 557. In most crimes *mens rea* is necessary and negligence is not an exception. What indicates the presence of *mens rea* in these collision cases is well set out in section 35 of the Offences against the Person Act 1861 "by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause."

In the present case there is abundant evidence that both drivers were negligent, and the negligence of each contributed in a substantial degree—that of the car driver in travelling fast across the junction and keeping no proper look (if it is true that he had not seen the van,) that of the van driver in keeping on when he saw the car coming very fast and thought it would "pass in front or behind" and took no step to avoid the collision until too late.

It is no defence to prove that the car driver was *also* negligent. "It is indeed well settled that it is no defence in a case of manslaughter that the death of the deceased was caused by the negligence of others as well as by that of the prisoner; for if the death of a deceased be caused partly by the negligence of the prisoner and partly by the negligence of others, the prisoner and all those others are guilty of manslaughter." *R.* v. *Ledger* (*supra*) and the same principle applies to cases under section 338 of the Penal Code.

It was argued that the appellant being on a main road had the right of way and that it was the duty of the car driver to keep out of his way. The accused said he kept straight and that he had the right of way.

There is no general law in this Colony that a car on a so called main road has a right of way. Two intersecting roads may each be a main road though those roads may not be of equal width. Mr. Spenser Wilkinson referred to *Mahaffy and Dodson's* Law relating to Motor Cars, 3rd Edition, page 77.

"The Lord President (Lord Dunedin) expressed himself in very clear terms. 'The driver, he said, 'knew that he was going to cross at right angles to a very frequented and main thoroughfare; and if there is one rule more than another that it is necessary to lay down for the practical conduct of traffic, it is that it is the business of those who are on the cross road and going to cross the main road to look out when they enter the main road and to give way to all traffic which is coming along the main road. Of course, there is a degree in everything. They have a right to cross the main road....but....where there is any possibility at all of collision it is the business of the person on the side road to give way to the person on the main road...." The 'rule' of which the learned Lord President spoke is one which commends itself strongly to practical men; but if it is read to mean that the driver on a main road may keep his course and speed at crossings and assume that every vehicle debouching on to the main road has the duty of keeping out of his way it is 'put too high.' The rule does not absolve the main road driver from approaching the entrance to side roads with care and precaution." Mr. Spenser Wilkinson also referred to the Highway Code prepared by the Traffic branch of the Straits Settlements Police at page 4.

> "No vehicle has a 'right of way' at cross roads, but it is the duty of a driver on a minor road when approaching a major road TO GO DEAD SLOW and to give way to traffic on the major road. Nevertheless drivers on a major road should always keep a sharp look out and drive cautiously at all road junctions."

If the rules and advice given in this useful little publication are observed by the public the danger of accidents will be greatly lessened. But the code does not create law. The law is as laid down in Ordinances and in Rules and Regulations made under Ordinances. The paragraph quoted is correct when it says there is no right of way at cross roads which are uncontrolled. Rights of way may possibly be created by directive traffic signs erected under the Traffic Regulation Ordinance or some such Ordinance. Such signs would apply only to the intersection near which they may be placed. In any case as the paragraph quoted says, it is the duty of drivers on main roads to keep a sharp look out and to drive cautiously.

The accused kept a look out but did not drive cautiously. He saw the car being driven fast, being driven negligently, but he kept his course and speed hoping that the car's speed would either take it in front of him or that it would reduce so as to pass behind him. His whole attitude was—'here am I on Grove Road, keep out of my way.'

The magistrate in his grounds of judgment does not discuss the difference between civil and criminal negligence but Mr. Spenser Wilkinson had addressed him on *Bateman's* case. Mr. Spenser Wilkinson's argument occupies almost three pages of the typed record and it cannot have been absent from the learned Magistrate's mind.

The appellant on his own shewing saw the car coming very fast but nevertheless continued his course and if he slowed down at all was still travelling fast at the moment of impact. He saw

the danger and made no effort to avoid it trusting entirely to the car avoiding him. The appellant was to my mind guilty of a great deal more than an error of judgment, and I think the evidence was amply sufficient to justify the Magistrate finding that the accused shewed such disregard for the safety of others as to amount to a crime.

Mr. Spenser Wilkinson has suggested that the Magistrate laid undue emphasis on the fact that accused had not a licence. Driving without a licence does not necessarily amount to negligent driving, but it may well be an indication of recklessness if a person with no qualifications for doing an act voluntarily undertakes to do it, as if a layman performed a serious surgical operation when there was no necessity for him to attempt it. But in the present case the accused seems to have driven quite often enough to have acquired the requisite knowledge and skill even if he had not passed a police examination for a driver's licence. The Magistrate realised that the accused had become in certain respects proficient, but he found that the accused accepted risk in the expectation that the car would manage to get past without any effort on his part to avoid collision.

One other point was touched on. It was said that at the close of the evidence for the prosecution a case had not been made out. Without assenting to this proposition but assuming it to be true, the accused's own evidence has established the crown case and the principle of *The King* v. *Power* (1919) 1 K.B. 579 applies.

It was urged upon me that the sentence of three months simple imprisonment was in any case excessive. Section 338 under which the accused was convicted authorizes a maximum sentence of two years rigorous imprisonment and a fine of $500.

A superior Court should not lightly interfere with a sentence of a lower Court unless that sentence is manifestly excessive or inadequate, or unless it is apparent that some mitigating or aggravating circumstances proved in evidence have not been fully taken into consideration.

In a recent case I reduced a sentence because the Magistrate in taking a mitigating circumstance into consideration, appeared to do so only partially. He only gave effect to it as being possibly true, whereas he had twice expressed the view that it was not true. It appeared to me on the evidence to be clearly true.

In the present case the learned Magistrate took into consideration in favour of the accused —the fact that he was on the superior road and the possibility as to contribution by the driver of the car. In so doing he gave the accused in the first place the benefit of his mistaken opinion that a motor vehicle on a so called " main road " owes no duty to avoid collision with a vehicle crossing the " main road " from a so called " side or minor road "; and in the second place in imputing the negligence of the car driver to the latter's unfortunate passenger.

There is some authority for saying that if the killed or injured person contributed to his own death or injury by his negligence, it may be taken into consideration in imposing punishment, *R.* v. *Longbottom*, 3 Cox's Criminal Cases, 439, but I am not aware that if the accused's guilt is shared by another not being the injured party it is *per se* an extenuating circumstance.

The contributory negligence can however be considered if it tends to shew that the culpable negligence of the prisoner was criminal in a lesser rather than in a greater degree. As I have said before the contributory negligence may itself be the only proximate or effective cause of the accident and it may possibly loom so large as to cause the negligence of the prisoner to appear little, if any, more than an error of judgment, so too contributory negligence may shew that the prisoner who crossed the line separating purely civil from criminal negligence has crossed if for a short, rather than for a long, way.

It is really a question of fact or degree in each case, and there is no rule of law that what would be an appropriate sentence if the accused alone were negligent is to be halved or quartered if one or three others shared his guilt.

It is impossible to say that the learned magistrate erred in the sentence he imposed, or that he failed to take into consideration any circumstances in mitigation.

I therefore dismiss the appeal.

Appeal dismissed.

Solicitors for appellant—*Donaldson & Burkinshaw.*

[ORIGINAL CIVIL JURISDICTION]

ADRIAN CLARK, J.

February 5, 1937.

RE S. M. ALI KADER & CO.
RE CHOP HOCK JOO SENG
RE CHOP TYE CHIANG HENG
RE CHOP KWONG WOH LOONG.

[SINGAPORE BANKRUPTCIES NOS. 482 OF 1922, 199 OF 1923, 67 OF 1924 AND 290 OF 1924].

Bankruptcy—Receiving Order against firm and no partner adjudicated.

Where a Receiving Order has been made against a firm and assets have been realised by the Official Assignee under his powers as receiver, but no person has been found against whom an Order of Adjudication can be made as partner of the firm the Court has no power to authorise the Official Assignee to distribute the assets amongst the creditors of the firm.

MOTION.

E. B. Williams, Official Assignee, in support of the motion.

ADRIAN CLARK, J.—In all these Bankruptcy proceedings Receiving Orders were made by this Court against trading firms and property